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Diversity and Inclusion: It's Much More Than Just Legal Compliance

By Denisha P. McKenzie and Todd R. Wulffson

Diversity and Inclusion Matters. Simply put, it is the right thing to do. There are also tangible benefits associated with a business' ability to attract and retain a diverse pool of employees. Since California and federal law specifically prohibit an employer from discriminating against an applicant or employee on the basis of any protected category (race, national origin, religion, gender, age, sexual orientation, disability, etc.), a homogeneous workplace of any kind should be an immediate red flag to business leaders. In addition, from a business perspective, the additional benefits associated with diversity in the workplace most often leads to another desirable result - increasing the business' bottom line.

Practical Business Advantages of Diversity in the Workplace

"Racial and gender diversity increases the creativity, innovation and profitability of organizations," says L. Song Richardson, Dean of UCI's Law School (currently the only woman of color to lead a top 21 U.S. law school). Having a wide range of employees with different backgrounds, experiences, and beliefs spurs collaboration and creativity in ways that lead to improved business ideas, products, services and opportunities. The stagnation that results from

"group think" is avoided where employees are able to offer and be exposed to diverse perspectives, opinions and ideas. The lack of representation within companies also increases the likelihood that businesses will not be able to connect with unique customer bases that could generate additional opportunities. Moreover, companies with employees who are from different backgrounds are better able to develop products and services to meet the needs of a diverse customer base, which in turn, increases revenue. In an increasingly multicultural, and global, business world, customers want to feel comfortable, respected, and understood. A company who cannot meet this level of customer service today is at a distinct disadvantage.

Mitigation of Legal Risks and Liabilities Resulting from Diversity in the Workplace

The chances of avoiding and mitigating legal risks and liabilities can significantly improve with greater workforce diversity. California is known for its employee-friendly laws, where hundreds of employment discrimination and harassment lawsuits are filed on a daily-basis. All things being equal, businesses with diverse workforces are far less likely to be sued for these claims as compared to workplaces that lack diversity. Even when these companies are sued, the

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chances of an employee prevailing at trial can be greatly diminished if the employer can demonstrate that it implements and maintains both a policy and a practice of diversity and inclusion.

In a disparate treatment lawsuit (employee must show they were discriminated against because of a protected factor), an employee has a significantly diminished chance of prevailing on the merits when the manager and the plaintiff share the same background. A critical factor in defending these cases is also to show that the company has policies in effect to minimize illegal discrimination and harassment. When the company can show that it has a legitimate commitment (with an established track record) of hiring and retaining employees from all racial backgrounds, it is more likely that the jury will believe the company's position.

Similarly, a discrimination claim based on a disparate impact theory can be virtually eliminated in a diverse workplace, because the plaintiff cannot demonstrate that an employer policy or practice results in a disproportionate number of minority employees being negatively impacted. In such a case, statistics become important, and it is far better for the company to have audited itself and corrected perceived issues before a future plaintiff calls attention to them at trial.

Recommended Steps to Advance Diversity and Inclusion in the Workplace

Hiring outside legal professionals that understand the principles of diversity and inclusion is an important part of creating an overall inclusive culture. While the legal profession is one of the least diverse industries in the United States, Carothers, DiSante, & Freudenberg, LLP ("CDF") has been ranked this year by Law360 as one of the "Best Law Firms for Minority and Female Attorneys" in the nation (with only offices in California). CDF is one of the few law firms who "practice what they preach" when it comes to labor and employment law; and the majority of its attorneys are women

and members of recognized minorities. To achieve similar results, law firms and businesses should implement the following steps to improve diversity and inclusion:

Hiring. Develop a strategy for hiring the best candidates from a wide applicant pool. There is no such thing as a lack of qualified, diverse candidates. Employers, however, sometimes do not cast their recruiting nets wide enough to find available job applicants (e.g. sending the same people to recruit at the same few schools year after year – or ignoring effective social media sites like LinkedIn). Employers should constantly self-audit, and adjust their recruitment practices to ensure the applicant pool, and those selected for interviews, are appropriately diverse.

Recognizing and Tackling Bias. Bias can appear at all stages of the employment process, from hiring, to discipline, promotion, and termination. Business leaders must take a top-down approach to make sure that issues of implicit bias (and even explicit bias) are dealt with in ways that promote positive interactions between employees without ignoring issues as they arise. From a hiring perspective, companies must be sure not to exclude or selectively favor some applicants over others. Once employed, business leaders must be sure that no negative trends develop regarding employment decisions.

Cultivating a Diverse and Inclusive Culture. Diversity can exist and flourish only where the leaders of an organization make it a priority, and encourage a culture of inclusion. Hiring a diverse array of employees is pointless where those employees do not feel like valued members of the organization. Companies must encourage collaboration between employees from all backgrounds, and find ways to incorporate diverse perspective into the ultimate business goals.

¹ Jill Backer, *What Is Diversity In The Legal Market Or Is Everyone A Special Snowflake?* (August 25, 2018), New York Law Journal.